IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1822

MATTHEW MADONNA,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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The Government's answer, narrowly contesting each separate argument of the petitioner, quite fails to dispel the cloud of unfairness that hangs over this conviction. For the essential capitulation of the defense position is that a series of rulings, expansively in favor of the Government but denying, in a crabbed fashion, all offers to present the heart of the defense case, violated due process and resulted in a conviction that cannot safely stand.

1. The Government's argument on the exclusion of the records of the clinic will be responded to more fully in a Reply to be filed by petitioner, Larca. Here it need only be said that the Government writes as if the chronology and circumstances were orchestrated by the defense. But, as the Government's Answer shows, it was the court that initially postponed the inquiry into the reliability

of the records, the court that then held an *ex parte* meeting with some officials of the clinic, the court that then peremptorily reversed the decision to admit the evidence and the court that denied the defense any opportunity to present testimony as to the reliability of the records. With all these matters tightly managed by the court, the defense simply was not permitted to demonstrate the worth of evidence that might have shown that a vital link in the story of the chief government witness was a fabrication.

2. The Government argues in its Answer (pp. 6-7), that the out-of-court declarations Madonna sought to introduce were properly excluded since they went to prove past fact by hearsay testimony, a procedure condemned in *Shepard* v. *United States*, 290 U.S. 96 (1933). But in *Shepard* the declaration in issue was offered *against* the defendant to prove his guilt of murder and consisted of a statement by the victim, while ill, that "Dr. Shepard has poisoned me". This Court held that the statement was improperly admitted because it was an accusation from beyond the grave, founded on mere suspicion, and not offered to prove the present or past feelings of the declarant but rather "as proof of an act committed by someone else". 290 U.S. at 104. The essence of the error was that the jury could only view the declaration as a charge by the victim that the defendant killed her. *Id.*

The present case is utterly different. Here a defendant sought to introduce testimony as to his own previous declaration to show that admitted acts were done with an innocent state of mind. Madonna never questioned Government proof that Larca loaned the car to Boriello, nor that he accompanied Larca to a rendezvous to retrieve the car. All that was in issue was whether this was done with a felonious intent. Barred from taking the stand himself, this was his only way of demonstrating an innocent state of mind. *Shepard* rests on the fundamental unfairness of allowing hearsay accusations into the trial to damn the accused. But here the unfairness goes all the other way. Evidence as to innocent intent, the credibility of which could well have been evaluated by the jury, was excluded. Nothing in the hearsay rule, and judicial discretion to apply that rule, can justify such an emasculation of the defense case.

Contrary to the Government's argument this case is on all fours with *Nuttall* v. *Reading Co.*, 235 F.2d 546 (3d Cir. 1956). The question in *Nuttall* was with what intent or in what state of mind the speaker did a future act, just as here the questions were: (a) what was Madonna's state of mind when he made the declarations, (b) what evidence was that of his state of mind when he retook possession of his car. A passage in *Nuttall* clinches its relevance to the instant case:

> . . . [T]he fact of a conversation in which the speaker was protesting and at the end of which he looked angry and clenched his fists is circumstantial evidence to prove that what he did thereafter was in submission to the force which he thought had been exerted. All of this is not an exception to the hearsay rule at all . . .
>
> In this instance, however, it matters not whether the evidence was hearsay. One of the exceptions to the rule excluding hearsay is that a man's declarations as to his state of mind may be used to establish that state of mind and, to some degree, such other things as proof of a state of mind tends to establish. *Id.* at 551.

In a criminal case, where the notion of due process governs, the arguments against exclusion are all the stronger. Here, where the Government was allowed to introduce tenuous and suspect evidence of alleged prior

similar acts, the exclusion of the evidence of the innocent mind was unconscionably harsh and deeply questions the fairness of the trial and the verdict of guilty.

3. The Government argues, (Ans. 8-9), that the admission of the evidence of alleged prior similar acts was within the court's discretion. But that discretion has "definite limits". *United States* v. *Turquitt*, 557 F.2d 464, 470 (1977):

> It does not suffice simply to see if the evidence is capable of being fitted within an exception to the rule. Rather, a balancing test must be applied. The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the Government's case and it must also be plain, clear and conclusive . . . (citations omitted), *Id.* at 468-69.

Here the evidence was dubious, somewhat internally contradictory, and further distorted by improper Government comments in summation. Petition at 15-16. Further, in examining the balance, the admission of the evidence cannot be considered *in vacuo*. It must be set by the side of the exclusion of the declarations of innocent intent, the barring of the defendant from the stand and the sheltering of the chief government witness from full cross-examination. Viewed in this total picture the scales register an unfair outcome.

4. On the argument that the court's ruling, permitting evidence of a prior conviction for homicide to impeach, was incorrect, the Government's answer is curious as to the law and misleading as to the facts. The Government suggests, (Ans. 9-10), that the petitioner never "renewed" his motion, that the denial of the motion was not "filed" until after the parties had summed up, and that it is unlikely that the ruling played any part in the petitioner's decision not to testify.

But the endorsement on the notice of motion, (a copy of which was included in the petitioner's appendix in the court of appeals), states that the ruling was made before the Government's case concluded "as indicated on the record". Notice can surely be taken of the fact that orders often lie for days in the clerk's office before filing. While it is true that the trial transcript on examination does not reveal the ruling, the court itself in its endorsement stated that the denial was indicated on the record. The petitioner was obviously unable at an appellate stage to challenge the accuracy of the transcript. The Government position appears to be that, where no evidentiary hearing is possible, every conceivable inference is to be made against the petitioner.

A much more reasonable approach would be to take the whole record as it stands. This demonstrates that a full and timely motion was made, that the court denied it in a ruling made before the Government's case concluded and that the court stated that this ruling had been made on the record. To ignore all this and suggest that the defendant has somehow failed at the appellate level, where no such opportunity exists, to prove a causal connection between the adverse ruling and his decision not to take the stand is a wholly perverse approach. The suggestion that "petitioner never renewed his motion" (Ans. 9) is quite misleading. What obligation was there to renew a motion that had been timely made and denied?

The Government further argues that, in any event, the denial of the motion was proper since the prior crime was not just an angry, random killing but was a vengeance murder for failure by the victim to pay a debt to petitioner's brother arising out of a narcotics transaction. But the Government refers here to nothing more than statements made by the prosecutor at *a post-verdict hearing*. This is a sorry assertion for petitioner fully demonstrated to the court of appeals (and see Petition 8)

that: (a) such a characterization of the previous crime was only an unsupported allegation by the prosecutor; (b) that the petitioner never was given any opportunity to challenge this in an evidentiary hearing; (c) that, had such an opportunity been afforded, the petitioner would have strongly contested this description of the killing; and (d) that there was no proof that the trial judge had even seen the transcripts of the bail hearings where there had been some mention of the previous conviction. Indeed, the transcript references to pre-trial bail hearings given by the Government (Ans. 10 n. 4) do not in any way bear out the proposition in the text of the footnote that the "facts of this homicide had been fully presented to the trial judge." They contain little more than bare references to the fact of a previous conviction for homicide.

In the end then, the Government's position is that, where no inquiry was made and where no hearing was held, all assertions now made by the Government must be believed. Nothing in law or justice can countenance such a proposition.

CONCLUSION

The court should grant the petition for certiorari.

Respectfully submitted,

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